Supreme Court, U.S.
FILED
FEB 10 1997
CLERK

NO. 96-01098

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

JOHN R. TOPP, Petitioner

v.

IDAHO STATE BAR, Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard I. Manweiler*
Manweiler, Bevis & Cameron
P.O. Box 8271
Boise, ID 83701
208/345-1040
*Counsel of Record

Michael J. Oths
Bar Counsel
Idaho State Bar
P.O. Box 895
Boise, ID 83701
208/334-4500
Attorney for Respondent

13 pp

QUESTIONS PRESENTED

1. May a state Supreme Court constitutionally impose professional discipline for a lawyer's false statement about a judge's integrity, if the court has found he has done so in an objectively reckless manner, without proof of actual malice as defined in *New York Times v. Sullivan*?

2. May a state Supreme Court constitutionally impose professional discipline for a lawyer's false statement that a judge decided a case other than on the merits, in the unique circumstance where the record is uncontroverted that the statement was indeed false?

3. [Same as stated by Petitioner] Should this Court summarily reverse the decision of the Idaho Supreme Court based on the undisputed facts and this Court's prior opinions regarding protected speech under the First Amendment?

TABLE OF CONTENTS

QUESTIONS PRESENTED 1

TABLE OF CONTENTS 2

TABLE OF CITATIONS 3

CITATION OF CASE BELOW 4

JURISDICTION 4

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED 4

STATEMENT OF THE CASE 5

REASONS THE PETITION SHOULD NOT BE GRANTED 7

1) The decision of the Idaho Supreme Court does not conflict with prior decisions of this Court 7

2) There is no conflict in the lower courts about the standard to be used. In fact, the standard is developing in a consistent manner 9

CONCLUSION 12

TABLE OF CITATIONS

CONSTITUTIONAL PROVISIONS

United States Constitution, amend. I 1, 5, 7, 8, 10

CASES

Eisenberg v. Boardman,
302 F. Supp. 1360 (W.D. Wis.1969) 10
Garrison v. Louisiana, 379 U.S. 64 (1964) 7
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991).....8
In Re Graham, 453 N.W.2d 313 (Minn. 1990), *cert. denied*,
498 U.S. 826 (1990).....9
Matter of Westfall, 808 S.W. 2nd 829 (Mo. 1991) 9
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).....8
New York Times v. Sullivan, 376 U.S. 254 (1964).....1, 7, 8
Ramirez v. State Bar of California, 619 P.2d 399 (1980).....10
St. Amant v. Thompson, 390 U.S. 727 (1968).....7, 8
Standing Committee on Discipline v. Yagman,
55 F.3d 1430 (9th Cir. 1995) 9, 10
State Bar v. Semaan,
508 S.W. 2d.429 (Tex.Civ.App. 1974).....10
U.S. District Court v. Sandlin, 12 F.3d 861 (9th Cir. 1993)...9

OTHER AUTHORITIES

Model Rules of Professional Conduct, Rule 8.2(a).....4, 9, 10
Annotated Model Rules of Professional Conduct,
(American Bar Association, 1996, 3rd Ed.).....9
Idaho Rule of Professional Conduct 8.2(a).....4

CITATION OF CASE BELOW

This matter has now been reported at 925 P.2d 1113 (1996).

JURISDICTION

Respondent concurs with Petitioner's statement of jurisdiction.

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

Petitioner has incorrectly stated the text of Idaho Rule of Professional Conduct 8.2(a). That rule and the identical American Bar Association Model Rule 8.2(a) both state:

Rule 8.2 - Judicial and Legal Officials

(a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications *or integrity* of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office. [The emphasized words were omitted in Petitioner's version].

STATEMENT OF THE CASE

While Respondent generally agrees with Petitioner's statement of the case, there are several clarifications that should be made.

First, while Petitioner understandably chooses to refer to this matter as a "judicial criticism" case, it is actually a "false statement about judges" case. All of the authorities and both parties in this case agree that actual criticism is protected by the First Amendment.

Additionally, this case presents a record that is unlikely to present much precedential value. Uniquely, the determination that *the statement was false* is uncontroverted. The record of this case was submitted entirely on stipulation, and because Petitioner chose not to try to prove that his statement was true, the Idaho Supreme Court reached the only possible conclusion:

> We conclude that ISB has established, for purposes of this case, that Topp's statements as to Judge Michaud's motivation were false. [FN2 omitted]. The parties stipulated that Judge Michaud would testify that his decision in the judicial confirmation proceeding was not politically motivated. Although Topp makes much of the fact that the parties did not stipulate to the truth of this testimony, we are aware of no requirement that parties must stipulate to the truth of evidence in the record before a court may consider that evidence. The stipulated testimony of Judge Michaud is not controverted, and the parties'

failure to stipulate as to the truth of that evidence is irrelevant. Petitioner's App. A7.

With those clarifications, Respondent accepts Petitioner's statement of facts.

REASONS THE WRIT SHOULD NOT BE GRANTED

1) The decision of the Idaho Supreme Court does not conflict with prior decisions of this Court.

Petitioner creates an artificial "conflict" in trying to compare the instant case to prior decisions of this Court. In fact, this Court has never addressed the issue of lawyer discipline for demonstrably false statements about a judge, nor has it undertaken to review discipline for violations of Model Rule 8.2(a) or its prior versions, at least since *New York Times v. Sullivan*, 376 U.S. 254 (1964).

While Petitioner bases much of his argument on *New York Times v. Sullivan* and its progeny, the first cited case that he offers is *Garrison v. Louisiana,* 379 U.S. 64 (1964). *Garrison* is actually a criminal case. The *Garrison* prosecution was fatally defective because it permitted criminal conviction even in the case of *truthful* statements. That overbreadth problem, coupled with the archaic theory of seditious libel, was the basis for reversing the Louisiana Supreme Court.

Petitioner then argues that the instant case presents a clear conflict with the *New York Times v. Sullivan* and following cases, notably *St. Amant v. Thompson*, 390 U.S. 727 (1968). First, it is significant that those matters were civil damage cases, while this is a lawyer discipline case. Petitioner's suggestion that the resolution of this case involves a simple application of the defamation cases is wrong. Very different considerations are present in the lawyer discipline context. As Petitioner grudgingly concedes, this Court recognized less than a *New York Times* standard in its only recent First

Amendment / lawyer discipline case, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

This case is part of a developing line of case law, following a logical evolution from *New York Times.* In the *St. Amant* case, this Court noted:

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case by case adjudication, as is true with so many legal standards . . . . 390 U.S. 727 at 730.

The reasoning of the Idaho Supreme Court, following recent precedent in both state and federal courts (as discussed below), is compatible with the evolution of *New York Times*.

Petitioner also suggests that the decision is in conflict with *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990). That decision, while declining to adopt an "opinion vs. fact" distinction, held that civil liability could not be imposed for statements not capable of being proven true or false.

This Court in *Milkovich* recognized that the implication contained in a speaker's remarks was important in considering whether the statements were actionable -- whether the context suggests other undisclosed facts. This important point was carefully incorporated into the decision in this case. The Idaho Supreme Court did not simply rely on an "opinion vs. fact" distinction, but specifically noted *Milkovich* in its opinion:

> This statement insinuates that Topp was privy to some facts about the two cases and about the motivation of Judge Kosonen in rendering his decision. Petitioner's App. A5.

This case does not conflict with prior decisions of this Court, and therefore the petition should not be granted.

2) There is no conflict in the lower courts about the standard to be used. In fact, the standard is developing in a consistent manner.

Petitioner also argues that there is a developing conflict in the lower courts about the standard to be imposed when a lawyer makes a false statement about a judge. In fact, decisions interpreting Model Rule 8.2(a) are consistent.

Model Rule 8.2(a) was originally adopted August 2, 1983. *Annotated Model Rules of Professional Conduct*, p. vii. (American Bar Association, 1996, 3rd Ed.). The seminal case recognizing the objective recklessness standard, as followed in the instant case, was *In Re Graham*, 453 N.W.2d 313 (Minn. 1990), *cert. denied*, 498 U.S. 826 (1990). The *Graham* decision was then explicitly followed in *Matter of Westfall*, 808 S.W. 2nd 829 (Mo. 1991). Thereafter, the Ninth Circuit followed the same reasoning in two separate cases, *U.S. District Court v. Sandlin*, 12 F.3d 861 (9th Cir.1993) and *Standing Committee on Discipline v. Yagman*, 55 F.3d 1430 (9th Cir. 1995).

Petitioner has not cited any cases in which Rule 8.2(a) has been interpreted differently. He relies on three cases to show a "conflict," the most recent of which was decided in 1980,

three years before Model Rule 8.2(a) was even adopted. Furthermore, the cases are all readily distinguishable.

In *Eisenberg v. Boardman*, 302 F. Supp. 1360 (W.D. Wis.1969), a Wisconsin federal District Court, in 1969, *upheld* discipline of a lawyer for statements about a judge, construing a different provision than Model Rule 8.2(a).

In *State Bar v. Semaan*, 508 S.W. 2d.429 (Tex.Civ.App. 1974), the court's discussion of First Amendment considerations in a lawyer discipline case are essentially dicta to the holding.

In *Ramirez v. State Bar of California*, 619 P.2d 399 (1980), again in a case *sustaining* discipline in a case not involving Rule 8.2(a), the court discusses First Amendment considerations only in a reverse fashion. In *Ramirez* the court held that cases which *do* involve *New York Times* actual malice *do not* receive First Amendment protection.

These are the only cases cited by Petitioner for his proposition that a conflict is developing in the lower courts. Nothing about any of the cited decisions could be even remotely considered a conflict, nor should they be used to invoke the review of this Court.

Petitioner argues that *Yagman*, cited above, creates an additional conflict. In fact, the 9th Circuit's decision in *Yagman* is entirely consistent with the instant decision and in fact is approved and followed by the Idaho Supreme Court. Petitioner's App. A7. The *Yagman* decision explicitly rules that falsity must be established by the prosecuting authority. As discussed previously, that consideration is uniquely met in this case, due to the manner in which the record was constructed.

Not only are lower court cases not in conflict, they are developing in a coherent and consistent manner. There is certainly no conflict that would require this Court to grant the petition for writ of certiorari.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Court deny the petition for writ of certiorari and allow the judgment of the Idaho Supreme Court to stand.

Respectfully submitted this 10th day of February, 1997.

Howard I. Manweiler*
Manweiler, Bevis & Cameron
P.O. Box 827
Boise, ID 83701
(208) 345-1040
*Counsel of Record

Michael J. Oths
Bar Counsel
Idaho State Bar
Boise, ID 83701
(208) 334-4500
Attorney for
Respondent